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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-720

BANK OF HENDERSONVILLE,
Petitioner

v.

RED BARON FLYING CLUB, INC.,
Respondent

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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STATEMENT OF FACTS

The facts are uncontroverted. Mid-South Aviation, Inc., an aircraft dealer, sold to Red Baron Flying Club, Inc., (Respondent herein) the subject aircraft out of its (Mid-South's) stock of several aircraft. The plane was paid for by a cashier's check. At the time of the sale, the Bank of Hendersonville (petitioner herein) held a floor-plan or inventory security interest upon a number of Mid-South's aircraft including the subject plane. Mid-South failed to satisfy the inventory security interest of petitioner. Mid-South subsequently was adjudicated a bankrupt.

The Bank of Hendersonville initiated this cause of action to enforce its lien against the subject airplane. Red Baron claims the status of purchaser for value in the ordinary course of business under the Uniform Commercial Code, Tennessee Code Annotated 47-9-307.

The security interest of the Bank of Hendersonville was, at all pertinent times duly recorded with the FAA Aircraft Registry in Oklahoma City in accordance with 49 U.S.C. §§1401-1406.

HISTORY OF THE CASE

1. June 4, 1975, Complaint by Bank of Hendersonville for Possession and balance due on Aircraft filed in the Putnam County, Tennessee Chancery Court as Cause No. 1002. Defendants named therein, Mid-South Aviation, Inc., (the dealer), Red Baron Flying Club, Inc., (the purchaser for value from the dealer) and Citizens Bank of Cookeville, Tennessee (who financed the purchase for the Red Baron).

2. October 10, 1975, Complaint dismissed as to Citizens Bank of Cookeville, Tennessee.

3. December 22, 1976, Memorandum Opinion by Chancery Court at Putnam County.

4. January 14, 1977, Final Decree of Chancery Court of Putnam County, Tennessee. Held that the security interest of the Bank of Hendersonville was superior to any interest of the defendant Red Baron Flying Club, Inc., and gave judgment for the Bank of Hendersonville against Red Baron Flying Club, Inc., for $13,759.59 and the costs of the cause.

5. Case appealed by the Red Baron to the Court of Appeals for the Middle District of Tennessee in Nashville, Tennessee.

6. December 2, 1977, Court of Appeals reversed the Chancery Court decision and dismissed the suit of the Bank of Hendersonville against Red Baron Flying Club, Inc.

7. The Bank of Hendersonville filed a Petition for Certiorari for review of the case by the Tennessee Supreme Court.

8. July 31, 1978, Supreme Court of the State of Tennessee denied, per curiam, the Petition for Certiorari.

9. Petition for Certiorari filed by the Bank of Hendersonville with the United States Supreme Court.

ISSUE SUCCINCTLY STATED

The issue succinctly stated is:

WHETHER AN AIRCRAFT DEALER'S INVENTORY FLOOR PLAN SECURITY INTEREST, DULY PERFECTED UNDER THE FAA ACT OF 1958, SURVIVES A SALE TO A PURCHASER IN ORDINARY COURSE OF BUSINESS FROM THAT DEALER.

ISSUE STATED AS A LEGAL QUESTION

Stated in terms of the legal question, the issue is:

WHETHER THE FAA ACT OF 1958 PREEMPTS STATE LAW (THE UNIFORM COMMERCIAL CODE, TENNESSEE CODE ANNOTATED §47-9-307) WHICH GIVES A BUYER IN THE ORDINARY COURSE OF BUSINESS GOOD TITLE EVEN THOUGH THERE WAS A PERFECTED SECURITY INTEREST IN THE AIRCRAFT IN THE HANDS OF THE DEALER.

THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code has been adopted in 49 of the states (Louisiana, the 50th state, has adopted a portion of it) and the District of Columbia. The Uniform Commercial Code provides the method of perfection for security interest in personal property (T.C.A. 47-9-102) except as is otherwise provided in T.C.A. 47-9-104 which excludes certain transactions. The exceptions set out in T.C.A. 47-9-104 include the following:

> "47-9-104. TRANSACTIONS EXCLUDED FROM CHAPTER.—This chapter does not apply.
>
> (a) To a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, *to the extent that such statute governs the rights of parties to and third parties affected by Transactions and particular items of property;* (emphasis added) . . .

Both the Uniform Commercial Code and the earlier common law protect the rights of purchasers of goods from a stock of merchandise of that kind against the claims of the inventory secured party of the selling merchant. Under the earlier common law, a bona fide purchaser for value from a merchant took good title, clear of the inventory mortgage or inventory trust receipt which might have

been given by that merchant. The Uniform Commercial Code contains the same protection. It is set out in Article IX, §307 as follows:

> "47-9-307. PROTECTION OF BUYERS OF GOODS. —A buyer in ordinary course of business (subsection [9] of §47-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by a seller even though the security interest is perfected and even though the buyer knows of its existence."

The term "buyer in the ordinary course of business" is defined in the Uniform Commercial Code in the following language:

> "47-1-201. GENERAL DEFINITIONS.—Subject to additional definitions contained in chapters 2 through 9 of this title which are applicable to specific chapters or parts thereof and unless the context otherwise requires, in chapters 1 through 9 of this article:
>
> . . . (9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods he buys in the ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as a security for or in total or partial satisfaction of a money debt."

FEDERAL AVIATION ACT OF 1958

The Federal Aviation Act of 1958 (49 U.S.C. §§1401-1406) was essentially a reenactment of the 1938 Civil Aeronautics Act. In 1964 there was a change in the 1958 Act to delete from §1406 the requirement of acknowledgements on instruments. This is the most recent amendment

to the FAA Act of 1958. Surrounding the 1964 enactment, there is a good deal of legislative history which gives some excellent insights to the application Congress intended for the FAA Act of 1958. For the convenience of this Court, the legislative history as taken from the U.S. Code and Administrative News for 1964, Vol. II, Pages 2322 through 2326 are set out in the Appendix hereto. One item in this legislative history is a letter to the Honorable Warren G. Magnuson from N. E. Halaby, Administrator of the FAA. At Page 2323 (Appendix Page 16) he points out that:

> "While recordation does afford notice to the world of the existence of an instrument affecting title, *it does not purport to establish the substantive validity of the instrument. As in the case with other recording systems, substantive validity of a recorded instrument remains a question of local law.*" (Emphasis added.)

The precise issue in the instant case is the validity of an inventory security interest as against a "purchaser in ordinary course of business."

The next letter in the legislative history is from the Honorable Robert E. Giles, General Counsel of the Department of Commerce. (Appendix Page 18). In his letter he says:

> "The principal purpose of H. R. 8673 is to amend Title V of the Federal Aviation Act of 1958 by adding a new section providing that *the validity of any credit instrument affecting title to or interest in civil and related equipment, the recording of which is provided for under section 503 of the Act, shall be governed by the place in which such instrument is delivered.*" (Emphasis added)

The last letter in the legislative history is from G. D'Andelot Belin, General Counsel for the Treasury Department (Appendix Page 19). His discussion is addressed

to the matter of Federal tax liens, and it merits noting that Federal tax liens, locally filed (in the place required by state law for the notation of liens on real estate of the taxpayer) prime any filing or recording with the FAA.

The fact that the United States Congress created a central place in which security interest in a highly mobile piece of equipment such as an airplane could be filed, in no wise changed the effect of the perfection. The Federal Aviation Act is absolutely silent as to many aspects of secured transactions. It contains no procedures for foreclosure. It is silent as to priority of claims, says nothing about the ultimate effect of recordation as to third parties. The official code comment to T.C.A.-47-9-104(a) says it clearly:

> "BUT TO THE EXTENT THAT THE FEDERAL AVIATION ACT DOES NOT REGULATE THE RIGHTS OF PARTIES TO AND THIRD PARTIES AFFECTED BY SUCH TRANSACTIONS, SECURITY INTERESTS IN AIRCRAFT REMAIN SUBJECT TO THIS ARTICLE."

REPORTED CASES SPECIFICALLY ON POINT

There are currently eleven reported cases that involve the precise question in the instant case.

Texas National Bank of Houston v. Aufderheide, 235 F.Supp. 599 (E.D. Ark. 1964).

States Securities Company v. Aviation Enterprises, Inc., 355 F.2d 225, CA-10 (1966).

Northern Illinois Corp. v. Bishop Distributing Co., 284 F.Supp. 121 (W.D. Mich. 1968).

United States Aviation Undre., Inc. v. WTAE Flying Club, 300 F.Supp. 341 (W.D. Tenn. 1969).

Suburban Trust & Savings Bank v. Campbell, 250 N.E. 2nd 118 (Ohio 1969).

Dowell v. Beech Acceptance Corp., Inc., 476 p.2d. 401 (1970), *cert. denied*, 404 U.S. 823 (1971).

Idabell National Bank, Idabell v. Tucker, 544 P.2d 1287 (Okla. App. 1975), *cert. denied.*

Haynes v. GECC, 423 F.Supp. 763 (W.D. Va. 1977).

Bank of Hendersonville v. Red Baron Flying Club, Inc., (Tenn. App., Middle Section, Nashville, Dec. 2, 1977, Cert. Denied Tenn. Sup. Ct., July 31, 1978) 571 S.W.2d 152.

Sanders v. M.D. Aircraft Sales, Inc., 23 U.C.C. Rep. 1316 (3d Cir., May 3, 1978), 575 F.2d 1086.

Cessna Fin. Corp. v. Skyways Enterprises, Inc., 23 U.C.C. Rep. 1015 (Ky. App., April 21, 1978).

Of these eleven cases ten held that there was no conflict between the Uniform Commercial Code and the Federal Aviation Act of 1958. They held that the FAA Act preempted state law only to the extent of providing a central place of recordation. The cases held that where the Federal Aviation Act was silent, such as on the issue of priorities between various claimants or lienholders or the validity of an instrument asserting a floor-plan security interest against the goods in the hands of a purchaser for value in ordinary course of business, one must look to the state law for answers.

The only case out of step with all the others is the *Dowell* case. In *Dowell*, California appears to stand alone in its insistence that a customer who buys an airplane out of the stock of a dealer must carry out a "title search" from recorded "floor plan" liens.

An airplane is a highly mobile piece of equipment. It is therefore obvious that Congress was undertaking to provide a central method and place of recording security in-

terests on aircraft. Although Congress could have preempted state law with reference to validity of security interests, priority of conflicting interests, etc., Congress has not chosen to act in that regard. Congress left the decision as to such matters to state law. That the State of California has chosen to subordinate its laws to a Federal statute (which was actually silent on the point in issue) is really no contradiction to the total unanimity of every other opinion on the subject.

In the instant case, the Tennessee Court of Appeals summarized its position as follows:

> "This Court prefers to follow the rule announced in all of the decisions (other than Dowell) that the rights of a purchaser from a dealer in ordinary course of business are superior to the holder of the lien upon a moving stock of planes in the hands of a dealer. There are a number of reasons why this decision is preferable.
>
> (1) The Uniform Commercial Code has brought uniformity and order to the field of commercial law. To graft a new class of exceptions upon the existing uniform law would reverse the wholesome intent and result of the law.
>
> (2) It is not reasonable to assume that Congress intended any such result where not clearly stated.
>
> (3) The proliferation of aircraft dealerships and aircraft purchases would be seriously impaired if the public were not allowed to trust dealers selling in ordinary course of business.
>
> (4) It is inequitable and unjust to allow a mortgagee to hold "secret liens" on chattels while authorizing the chattels to be exhibited for sale by a dealer to the deception and loss of the purchasing public.
>
> (5) Lien holders may protect themselves (if they desire by impounding the mortgaged planes in locked surroundings inconsistent with the free-sales situation of the stock of merchandise.

To all of this, respondent can only add that, where the Federal law speaks, it preempts state law. Where the Federal law is silent, the Courts must look to state law. Traditionally, all states have guarded the rights of purchasers for value in the ordinary course of business for many years and have now incorporated that attitude into the Uniform Commercial Code. There is nothing in the Federal Aviation Act which either requires or justifies any change from that position.

Respondent therefore respectfully asserts that the judgment of the Tennessee Court of Appeals was completely correct. That judgment was affirmed by the Tennessee Supreme Court by the per curiam denial of the petition for certiorari. It is suggested that there is no matter which should be reviewed by this court and therefore the petition for certiorari should be denied.

Respectfully submitted,
Ernest Williams, III
Attorney for Respondent
Red Baron Flying Club, Inc.

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AVIATION—RECORDING OF INSTRUMENTS

For text of Act see p. 281

Senate Report (Commerce Committee) No. 1060, June 5, 1964 [To accompany H.R. 8673]
House Report (Interstate and Foreign Commerce Committee) No. 1033, Dec. 12, 1963 [To accompany H.R. 8673]
Cong. Record Vol. 109 (1963)
Cong. Record Vol. 110 (1964)

DATES OF CONSIDERATION AND PASSAGE

House Dec. 17, 1963
Senate June 19, 1964
The Senate Report is set out.
Senate Report No. 1060

The Committee on Commerce, to whom was referred the bill (H.R. 8673) to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall be governed by the laws of the place in which such instrument is delivered, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The bill would create a uniform Federal rule which would provide that the validity of certain instruments affecting title to or interest in aircraft shall be governed by the laws of the State, District of Columbia, territory, or possession in which they are delivered. Designation of the place of delivery in the instrument would constitute presumptive evidence that the instrument was delivered at the place so specified. The bill makes clear that this legislation in no way affects the Convention on the International Recognition of Rights in Aircraft. In addition, the Administrator of the Federal Aviation Agency would be authorized to except certain instruments from the present statutory requirement that they must be notarized before recordation.

ANALYSIS AND NEED FOR LEGISLATION

The bill is similar in purpose to S. 2773, 87th Congress, which was reported favorably by this committee September 4, 1962, and which passed the Senate September 7, 1962. This legislation incorporates recommendations originally proposed by the Bar Association of

the City of New York and is designed to facilitate identification of local laws governing the validity of aircraft instruments. It establishes a uniform Federal rule governing the validity of instruments affecting title to or interests in aircraft and related equipment. The rule would apply to all instruments subject to the recording provisions of section 503 of the Federal Aviation Act. Included would be various instruments executed for security purposes such as conveyances, leases, mortgages, equipment trusts, conditional sales contracts, etc. Assignments, amendments, and supplements to such instruments would similarly be covered. To determine the validity of such an instrument, one would need only to look to the substantive law of the particular State in which the relevant instrument was delivered.

The fact that the determination of the validity of aircraft conveyances involved extremely cumbersome and complex procedures was recognized by the Congress when it originally enacted the Civil Aeronautics Act of 1938. That act contained a provision which provided for the establishment of a central national recording system for all instruments affecting title to or interest in civil aircraft of this country. This provision was incorporated in section 503 of the Federal Aviation Act of 1958 substantially without change. It contained the previously established recording system and provides that no conveyance or instrument affecting aircraft shall be valid until filed for recordation except as to parties to the instrument or persons with actual knowledge of its existence. When the instrument has been filed for recordation under the law, all persons are deemed to have notice of its existence and its effect on title to the property covered thereby. Consequently, to determine whether there are any encumbrances on the aircraft, it is only necessary to consult the central file.

While existing law has assisted materially in facilitating the determination as to the validity of instruments, it does not establish the substantive validity of the instrument as proposed by this measure. Considerable doubt and confusion still exist in this field. The laws of the various States differ quite substantially with respect to the validity of various instruments. In attempting to resolve the issue as to which jurisdiction's laws should apply in determining such an instrument's validity, it is arguable that the law of one of three of the following jurisdictions is applicable: The jurisdiction in which the property is located; the jurisdiction in which the parties reside; or the jurisdiction in which the instrument was executed and delivered. As an example of the needless com-

plexities and difficulties in making such a determination, suppose an airline desired to refinance its fleet of aircraft: each of the three rules governing jurisdiction would have to be covered. With respect to the first, for example, it would be necessary to know the exact location of every aircraft at the precise moment the refinancing instrument was executed. Pinpointing the exact location of aircraft, many of which today fly at speeds well in excess of 500 miles an hour, is extremely difficult and at times impossible. Such unnecessary and costly procedures which one must now go through to determine the validity of aircraft instruments would be remedied by this legislation. The bill selects, and the committee is convinced, most logically, the place where the instrument is delivered. Consequently, the prospective purchaser would not only be able to readily ascertain whether encumbrances are recorded against an aircraft but would in addition be in the position to assess the validity of any instruments affecting the aircraft's title by simply consulting the law of the place where the instruments were delivered.

The bill also amends section 503(e) of the Federal Aviation Act which provides that no instrument shall be recorded unless acknowledged before a notary public. This acknowledgement requirement is unnecessarily burdensome and directed to no useful end when applied to certain conveyances and instruments which do not normally depend for validity upon acknowledgement to establish their authenticity. This would include various governmentally issued documents such as judicial decrees. Certified copies of these official records are presently admissible in the courts to determine private rights by virtue of rule 44 of the Federal Rules of Civil Procedure. Consequently, more stringent proof of authenticity is unnecessary. The committee is advised that the Federal Aviation Agency has received numerous complaints from various private citizens and Government officials to the effect that this procedure is cumbersome and unnecessary. The Agency, of course, was not in a position to remedy the situation since the procedure is specifically required by statute. Since no useful purpose is served by requiring the inclusion of certain instruments in section 503(e) the bill authorizes the Administrator of the Federal Aviation Agency to except such instruments by regulation.

TAX LIEN PROPOSAL

The Internal Revenue Code (26 U.S.C. 6321, 6323) provides that notices of Federal tax liens shall be filed with the U.S. district court or the office provided by State law in the jurisdiction where

the taxpayer's property is located. The Internal Revenue Service has, as a matter of practice, only filed its notices of tax liens locally and not with the Federal Aviation Agency. It has been contended by some that the Federal Aviation Act requires the Service to file tax liens with the Federal Aviation Agency. In order to clarify this point, the Treasury Department proposed that the committee adopt in this bill an amendment to the Federal Aviation Act to specifically exclude tax liens from the recording provisions. The Air Transport Association, together with several airlines, strongly objected to the proposed amendment and expressed the view that it should be made the subject of separate hearings. While the committee appreciates the desire of the Internal Revenue Service to settle, by means of substantive legislation, the tax lien question, and agrees that this bill provides an appropriate vehicle for its resolution, the latter is extraneous to the basic objective of this legislation, viz., the establishment of a uniform Federal rule governing the validity of aircraft conveyances. Since the bill, without the amendment, is noncontroversial and provides a highly desirable clarification of law, the committee determined that it should be passed without delay. In so doing, the committee wishes to make unequivocally clear that its action should not in any way be interpreted as a judgment that the tax lien proposal either is or is not desirable or as a reflection on the validity of the arguments advanced in support thereof by the Treasury Department. The committee is simply deferring its decision in order to afford all interested parties the opportunity to fully express their views in open hearings in the near future.

CONCLUSION

The purpose of the bill is directed toward the unnecessary ambiguity, complexity, and time-consuming procedures involved in determining the validity of aircraft conveyances. Passage of this measure will minimize these problems and greatly facilitate the ease by which aircraft can be financed. The committee is convinced of the need for this legislation and accordingly urges its favorable consideration.

COST OF THE LEGISLATION

There will be no additional cost incurred by the Government as a result of favorable action on this legislation.

AGENCY COMMENTS

The Department of Justice had no comment on this bill.

The following written reports were received from Government agencies:

CIVIL AERONAUTICS BOARD
Washingon, D. C., January 14, 1964

Hon Warren G. Magnuson,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D. C.

Dear Mr. Chairman: This is in reply to your letter of January 7, 1964, requesting the views of the Board with respect to H.R. 8673, an act to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall be governed by the laws of the place in which such instrument is delivered, and for other purposes.

The provisions of the bill would not affect the functions and activities of the Board, but rather involve matters which are the responsibility of the Administrator of the Federal Aviation Agency. In these circumstances, the Board does not have any comments to offer with respect to the bill.

Sincerely yours,

ALAN S. BOYD,
Acting Chairman.

COMPTROLLER GENERAL OF THE UNITED STATES
Washington, January 17, 1964.

B—148101.
Hon. Warren G. Magnuson,
Chairman, Committee on Commerce,
U. S. Senate.

Dear Mr. Chairman: Further reference is made to your letter of January 7, 1964, acknowledged on January 8, requesting the comments of the General Accounting Office concerning H.R. 8673, 88th Congress, 1st session, entitled "An act to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall

be governed by the laws of the place in which such instrument is delivered, and for other purposes."

We have no special information or knowledge as to the desirability of the proposed legislation and, therefore, we make no recommendation with respect to its enactment.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

FEDERAL AVIATION AGENCY,
Washington, D. C., January 17, 1964.

Hon. Warren G. Magnuson,
Chairman Committee on Commerce,
U. S. Senate, Washington, D. C.

Dear Mr. Chairman: This is in reply to your request of January 7, 1964, for the views of this Agency with respect to H.R. 8673, an act to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall be governed by the laws of the place in which such instrument is delivered, and for other purposes.

Title V of the Federal Aviation Act establishes a central recording system for all instruments affecting title to or interest in civil aircraft of the United States. Section 503 provides that no conveyance or instrument affecting title to an aircraft shall be valid until filed for recordation, except as to parties to the instrument or those with actual notice of its existence.

While recordation does accord notice to the world of the existence of an instrument affecting title, it does not purport to establish the substantive validity of the instrument. As is the case with other recording systems, substantive validity of a recorded instrument remains a question of local law. Determining which local law applies to the instrument is extremely difficult, however, when one is dealing with highly mobile property such as aircraft. In the existing state of the law, therefore, the parties executing an instrument affecting aircraft, or prospective purchasers of aircraft seeking to determine the validity of encumbrances recorded against the property, may be faced with considerable uncertainty as to the State law applicable.

Section 1 of H.R. 8673 has as its sole purpose the identification of

the local law which will govern the validity of recorded instruments. It selects, we believe logically, the law of the place where the instrument was delivered. Thus, the prospective purchaser who finds an outstanding mortgage recorded against an aircraft will, by consulting the law of the place where the mortgage was delivered, be in a position to assess its validity. Likewise, the parties to a mortgage need only conform their instrument to the law of the intended place of delivery to insure its validity.

We believe H.R. 8673 has been carefully tailored to meet the precise problem presented, and we are in favor of its enactment. It will not interfere with our administration of the recording system and promises to increase the utility and effectiveness of that system.

Section 2 of H.R. 8673 amends present section 503(e) of the Federal Aviation Act of 1958, which requires that "no conveyance or other instrument shall be recorded unless it shall have been acknowledged before a notary public or other officer authorized by the law of the United States, or of a State, Territory, or possession hereof, or the District of Columbia, to take acknowledgment of deeds."

This requirement is unnecessarily burdensome and directed to no useful end when applied to certain conveyances or instruments of title which are not normally and do not depend for validity upon being acknowledged before a notary public to establish their authenticity, for example governmentally issued documents such as judicial decrees. Under rule 44 of the Federal Rules of Civil Procedure, properly certified copies of these official records are admissible in courts of law to determine private rights. It seems unnecessary to require more stringent proof of authenticity for recording purposes.

The Agency has engaged in a good deal of correspondence regarding this requirement with both citizens and Government officials to all of whom the procedure seems cumbersome and unnecessary. We have had to take the position in replying to this correspondence that section 503(e) of the act, as presently worded, leaves us no choice in the matter.

We believe the recording system could be administered more efficiently and more simply if we had that choice. We therefore recommended to the House committee that section 503(e) of the Federal Aviation Act of 1958 be amended to permit the Administrator of the Federal Aviation Agency to determine what instru-

ments or conveyances must be so acknowledged before recordation. We suggested that this could be accomplished by inserting the phrase "Except as the Administrator may by regulation prescribe," as the introductory phrase to the sentence now serving as section 503(e) of the Federal Aviation Act of 1958. Section 2 of H.R. 8673 incorporates this recommendation and we favor its enactment.

The Bureau of the Budget has advised that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely,

N. E. Halaby, Administrator.

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
Washington, D. C., March 25, 1964.

Hon. Warren G. Magnuson,
Chairman, Committee on Commerce,
U. S. Senate,
Washington, D. C.

Dear Mr. Chairman: This is in further reply to your request for the views of this Department concerning H.R. 8673, an act to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall be governed by the laws of the place in which such instrument is delivered, and for other purposes.

The principal purpose of H.R. 8673 is to amend title V of the Federal Aviation Act of 1958 by adding a new section providing that the validity of any credit instrument affecting title to or interest in civil aircraft and related equipment, the recording of which is provided for under section 503 of the act, shall be governed by the laws of the place in which such instrument is delivered.

At present there is no certainty with respect to the validity of credit instruments affecting civil aircraft and related equipment. Each State has its own requirements concerning the recordation of credit instruments and the validity of contracts executed in other jurisdictions.

H.R. 8673 would tend to encourage lending institutions to extend credit to the aviation industry by establishing certainty as to the validity of credit instruments secured by aircraft, and by reducing

the costs incident to multiple filing and enforcing liens under the present system.

This Department, therefore, recommends enactment of H.R. 8673.

We have been advised by the Bureau of the Budget that there would be no objection to the submission of our report from the standpoint of the administration's program.

Sincerely,

Robert E. Giles.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, February 28, 1964.

Hon. Warren G. Magnuson,
Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.

Dear Mr. Chairman: Reference is made to your request for the views of this Departmen on H.R. 8673, to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall be governed by the laws of the place in which such instrument is delivered, and for other purposes, and an amendment adopted by your committee to the bill.

H.R. 8673 would add new section 506 to the Federal Aviation Act to provide that the validity of any instrument the recording of which is provided for by section 503 of such act shall be governed by the laws of the State, District of Columbia, territory, or possession of the United States wherein it is delivered. The bill would also amend section 503 of the act to authorize the Administrator of the Federal Aviation Agency to except certain instruments from the necessity of having to be notarized before recordation.

The amendment adopted by your committee would provide as follows:

"Sec. —. Section 503(a) of the Federal Aviation Act of 1958 is amended by adding thereto the following new subsection:

" '—. Any tax lien arising under the internal revenue laws of the United States, the District of Columbia, any State of the United States or any political subdivision thereof, and the possessions of the United States, are specifically excluded from the recording provision of this section.' "

Under the present act the term "conveyance" is defined in section 101 (17) as including any "instrument affecting title to, or interest in, property." The regulations of the Federal Aviation Agency (14 CFR 503.2(a)) provide that the term "conveyance" includes a "notice of tax lien." The regulations of the Agency further provide that to be eligible for recordation a conveyance must describe the aircraft, propellers, or spare parts affected by the conveyance or lien.

The regulations of the Federal Aviation Agency are considered to be inconsistent with the provisions of sections 6321 and 6323 of the Internal Revenue Code and the regulations prescribed thereunder (26 CFR 301.6321—1, 301.6323—1). The Federal tax lien is a general lien attaching to all property and rights to property belonging to the taxpayer and the notice of the lien is not required to describe the property to which it attaches, nor is it required that the notice be filed in specific offices to cover individual pieces of a taxpayer's property. Notices of tax liens are filed in the offices designated by the States in which property subject to the lien is located, or, if the State has not by law designated an office for the filing of notices of tax liens, they are filed in the office of the clerk of the U. S. district court for the judicial district in which the property subject to the lien is situated. Notices of tax liens to cover all personal property are filed in a designated office where the taxpayer is domiciled.

The filing of the notice of Federal tax lien as prescribed by section 6323 of the Internal Revenue Code is a time-honored procedure which has been upheld by the courts over the years cf., United States v. Union Central Life Insurance Company (1961) 368 U.S. 291. Any law which could be interpreted to require that the notice of tax lien enumerate the specific property to which it attaches would create confusion where none should exist. Thus, the enactment of H.R. 8673 without your committee's amendment specifically excluding all Federal, State, and local tax liens from the recordation provisions of the Federal Aviation Act would lead to further confusion and ambiguity.

The Department submitted a report along the same lines as set forth herein on S. 475 (88th Cong., 1st sess.), a bill which would have accomplished the same purposes as H.R. 8673 and which was similar to S. 2773 (87th Con., 2d sess.). Your committee in its Report No. 1995 to accompany S. 2773 made the following comments:

"The problems in recording notices of tax liens prove particularly troublesome, since the Internal Revenue Code (26 U.S.C. 6321, 6323) provides that notices of Federal tax liens shall be filed with the U. S.

district court, or the office provided by State law in the jurisdiction where the taxpayer's property is located. The Internal Revenue Service has, as a matter of practice, only filed its notices of tax liens locally and not with the Federal Aviation Agency. Accordingly, a purchaser in examining the central filing system maintained by the Agency could easily be misled in assuming that the absence of tax lien notices in the Agency's file meant that no such lien existed. To remedy this situation, two alternative solutions are presented: An amendment to the Federal Aviation Act to exclude tax liens from the recording provisions or an amendment to the Internal Revenue Code requiring that Federal tax liens must be filed with the Federal Aviation Agency. Your committee is convinced that an amendment to the Federal Aviation Act is clearly the most practical and logical choice. A Federal tax lien is a general charge on all real and personal property of a delinquent taxpayer and does not describe specific property. Consequently the Internal Revenue Service would have no practical means of ascertaining which of the many delinquent taxpayers owned aircraft. It would have to either file every tax lien with the Agency or be required to make a most needless and time-consuming search of the Agency's aircraft registration records. In addition, since a lien is a charge on after-acquired property, effective operation of the recording system would require that all new applicants for aircraft registration certificates be checked against the current delinquent list in order that existing liens could be recorded against the newly acquired aircraft. There is also the possibility that in creating an exception for aircraft to the general scheme of tax enforcement, questions would be raised regarding the sufficiency of local notices of tax liens against other forms of property."

The Department concurs with the views expressed in the foregoing report and if H.R. 8673 is amended as recommended by your committee the Department would have no objection to its enactment. Otherwise, the Department would be strongly opposed to the proposed legislation.

The Department has been previously advised by the Bureau of the Budget that there was no objection from the standpoint of the administration's program to the submission of a similar report on S. 475, a similar bill.

Sincerely yours,

G. D'Andelot Belin,
General Counsel.